

News Syndicate Co., Inc. and Newspaper Guild of New York Local 3, American Newspaper Guild, AFL-CIO, Petitioner.
Case 2-UC-4.

May 8, 1967

DECISION AND ORDER DENYING PETITION TO CLARIFY CERTIFICATION

BY MEMBERS FANNING, BROWN, AND JENKINS

On January 19, 1938, the Board certified the Petitioner herein as the bargaining representative for a unit of employees in the commercial department (advertising, circulation, promotion, and general business work) of the Employer.¹

On February 16, 1966, the Petitioner filed the instant petition for clarification of the above unit by including franchise dealers therein, and a hearing was held before Hearing Officer Haywood E. Banks of the National Labor Relations Board. Newspaper and Mail Deliverers' Union of New York and Vicinity, Independent, hereafter called the Intervenor, was permitted to intervene at the hearing on the basis of a 50-year contractual relationship covering a unit of employees in the Employer's delivery operations. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed. All parties filed posthearing briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

Upon the entire record in this case, the Board finds:

1. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.

2. The Petitioner and Intervenor are labor organizations claiming to represent certain employees of the Employer.

3. The Employer is engaged in the publication of daily and Sunday newspapers (herein referred to collectively as the News) in New York, New York. It employs about 5,500 employees. About 1,100 of such employees are represented by the Intervenor, and about 1,600 by the Petitioner, under collective-bargaining contracts executed on June 11 and December 10, 1965, respectively, both to be effective from March 31, 1965, to March 30, 1967.

Prior to 1965, the Employer circulated its papers mainly through independent retail outlets, such as

newsstands, candy, drug, or stationery stores, with less than 5 percent of its sales attributable to home delivery. This home delivery was made by independent route dealers who, like the above-mentioned retail outlets, handled publications other than the News. The independent route dealers have never been represented by either the Petitioner or the Intervenor. Commencing in February 1965, following a study seeking to improve its home delivery sales, the Employer instituted a system of franchise dealerships. At the time of the hearing in this proceeding, the Employer had about 45 franchise dealers. The Petitioner and the Intervenor seek to include these franchise dealers in their respective units. The Employer, however, would dismiss this proceeding on any of the following grounds: (1) the franchise dealers are independent contractors, or (2) they are supervisors, or (3) they lack sufficient community of interest with the employees in either of the respective units to warrant inclusion therein.

The record shows that prospective franchise dealers, following an interview with representatives of the Employer, are required to execute a formal contract setting forth the basic rights and obligations of the parties under the franchise arrangement. The contract is a standard form developed by the Employer, with blank spaces for the franchise dealer's name, his territory designation, and wholesale rates. Under the contract, the Employer agrees to furnish the names and addresses of subscribers in the territory, to assist the franchise dealer by various promotional programs to develop additional subscribers in the territory, and to assign the territory to no other franchise dealer.² The franchise dealer agrees to purchase from the Employer, at the contractual wholesale rate or at such other prices the Employer may fix from time to time, a sufficient number of papers for delivery and resale to all single copy home subscribers in the territory at no more than the regular established home delivery price. He also agrees to provide a place of business within the territory, carry public liability insurance with stated minimum limits, and maintain an adequate staff and equipment. The franchise dealer must furnish the Employer a cash deposit or surety bond equal to twice the amount of his weekly bill. He agrees further to develop new subscriptions and to participate in promotional programs instituted by the Employer to increase home delivery operations.³ The contract requires the franchise dealer to furnish lists of subscribers in his territory and persons employed by him, advise the Employer of changes in the lists as they occur, and safeguard the subscriber list against disclosure

¹ *News Syndicate Co., Inc.*, 4 NLRB 1071

² Although the contract reserves the right to the Employer to supply home subscribers in the territory by mail, it does not appear that the Employer has exercised this right

³ In connection with one such program referred to in the record as telephone order day, the Employer requires the franchise

dealer to man telephones on its premises to receive calls from carrier boys who obtain new subscriptions. The Employer does not insist on participation in all such promotional programs or upon attendance at meetings of franchise dealers it conducts with respect to promotional programs

without the Employer's written consent. Subscriber complaints and stops must be investigated immediately by the franchise dealer, who agrees to maintain frequent and regular contact with the Employer to receive notice of such, and to submit within one week a written report to the Employer pertaining thereto. The contract expressly prohibits the dealer from (1) handling other papers or advertising matter of other papers; (2) stamping or inserting any advertising matter without the Employer's written consent; (3) attempting to assign or transfer the contract or any rights thereunder without the Employer's written consent, under pain of immediate cancellation at the option of the Employer; (4) charging carrier boys more than the price established by the Employer; and (5) returning at cost unsold papers. Whenever it appears to the Employer that the franchise dealer is unable to service his territory adequately because of its growth and development, the contract reserves the right to the Employer to effect a split, transfer, or other rearrangement of such territory. The franchise dealer may terminate the contract at any time upon 60 days' written notice, but the Employer may terminate without notice if the franchise dealer breaches any provision of the contract. Upon termination, or of the assignment of the franchise dealer's interest with the Employer's consent, the latter may require the franchise dealer to account for all subscriptions paid for in advance. The contract contains a recital that the franchise dealer is an independent contractor, with sole control of all persons engaged by him, and that he shall determine the mode and manner in which delivery and collections are made. Finally, the contract provides that the Employer shall not be liable for failure to supply papers to the franchise dealer because of strike, labor dispute, or suspension of publication by the Employer.

In addition to the foregoing contract, the Employer requires the franchise dealer to sign a standardized so-called interim agreement, which sets forth the prices which he may charge his carrier boys and subscribers. This agreement also provides that the Employer will pay a weekly subsidy to the franchise dealer geared to his draw, plus fixed amounts for itemized weekly expenses for rent, telephone, car, Sunday man, and insurance. The Employer also agrees to pay, subject to change at its sole discretion, fixed amounts for new subscriptions developed by the franchise dealer, or persons working for him, and he agrees to pay from such amounts those persons under him who obtain subscriptions at rates suggested by the Employer from time to time. By the terms of this agreement, such interim arrangements will continue until such time as the volume of subscriptions warrants

establishment of an "independent" rate sufficient to provide an equal or better return to the franchise dealer and to cover all of the expenses of his operations.⁴ The Employer expressly reserves the right to terminate the interim arrangements if the franchise dealer breaches any provision of the separate contract described above.

The record shows that the territories for franchise dealers are unilaterally established by the Employer, and that in two instances the Employer assigned territories contrary to the express wishes of the prospective franchise dealers involved. Moreover, the Employer instructed one of such franchise dealers to commence operations in a particular part of his assigned territory. The record also shows two instances where franchise dealers sold or transferred part of their respective territories. One of such transactions was suggested by the Employer, the other achieved with its consent, and the compensation rates for both were fixed by the Employer. The franchise dealer selects his own place of business within his assigned territory, subject to a check by the Employer as to the accessibility of such place of business to established routes for its delivery trucks, and operates under the name of "Daily News Home Delivery Service." Classified advertisements placed by the Employer for prospective franchise dealers state that the latter need make no capital investment. The franchise dealer must own and maintain his own transportation facilities, but is not required by the Employer to use any particular kind of vehicle. He also engages carrier boys to make ultimate deliveries to subscribers, as well as substitutes and other personnel to assist him and telephone solicitors employed by the Employer assist him in obtaining both carrier boys and subscribers. The Employer makes no social security or withholding deductions for the franchise dealer or persons engaged by him, nor does the Employer accord them any fringe benefits. Although, as shown above, the franchise dealer has no right to return unsold papers to the Employer, any loss on his part in this respect is minimized by the contractual requirement for daily regulation of his draw according to stops and starts received from customers directly by him or indirectly through the Employer. The Employer supplies him with all record forms it deems necessary for efficient operation, and for its verification in connection with the weekly subsidies under the above-described "interim agreement."

In determining the status of persons alleged to be independent contractors, the Board has consistently held that the Act required application of the "right of control" test. Where the one for whom the services are performed retains the right to control the manner and means by which the result is to be accomplished, the relationship is one of

⁴ The record shows that the itemized expense allowances are not geared to the franchise dealer's actual expenses, and that

none of the "interim agreements" have been changed since entered into

employment; while, on the other hand, where control is reserved only as to the result sought, the relationship is that of an independent contractor. The resolution of this question depends on the facts of each case, and no one factor is determinative. On the basis of the foregoing facts and the entire record, we are satisfied that the franchise dealers are employees, rather than independent contractors. Although the evidence discloses a number of factors usually deemed indicative of an independent contractor status, the presence of these factors does not alone establish such status. Thus, we are not persuaded and do not consider controlling the fact that a written contract recites that the relationship is one of independent contractor; that the franchise dealers provide their own location and equipment; that the Employer makes no payroll deductions for them; or that they hire and pay carrier boys and others to assist them.

The result to be accomplished through the franchise dealership arrangement is the circulation of the Employer's paper to home subscribers. In accomplishing this result, the franchise dealers bear slight resemblance to the independent businessman whose earnings are controlled by self-determined policies, personal investment and expenditures, and market conditions. The franchise dealers have no proprietary interest in their territories, which are unilaterally assigned and controlled by the Employer, and any attempt by them to transfer all or part thereof, without the written consent of the Employer, is ground for termination of the franchise arrangement at the option of the Employer. The Employer may also, at its option, split, transfer, or otherwise rearrange a territory when it deems the volume of subscriptions therein to have grown too large for the franchise dealer to service adequately. Newspaper prices at all stages of the operation—the wholesale rate paid by the franchise dealer, the price he charges the carrier boy, and the ultimate price paid by the subscriber—are fixed by the Employer. The franchise dealers may not handle any other newspaper or advertisement of any other newspaper. The Employer may terminate the arrangement without notice whenever it deems the franchise dealer to have breached the contract, and is not liable for failure to supply him in the event of strike, labor dispute, or suspension of publication. On the record as a whole, therefore, we conclude that the franchise dealer's opportunity for profit is limited by the Employer's control of essential factors of employment, and are not controlled primarily by his efficiency in performing his work. Accordingly, as the Employer has to a large extent reserved the right to control the manner and means, as well as the result, of the work of franchise dealers, we find that they are not independent contractors, but employees.⁵

As noted above, the Employer contends that even if the Board finds that the franchise dealers are not independent contractors, they are nevertheless supervisors within the meaning of the Act. This contention is based on the fact that the franchise dealer hires and controls carrier boys and others to assist in his home delivery operation. It is clear, however, and the Employer does not contend otherwise, that the persons so engaged by the franchise dealer are not employees of the Employer. Accordingly, as the franchise dealer does not exercise any supervisory authority over any employees of the Employer, we find that, in their employment relationship with the Employer, which is the only relationship relevant here, the franchise dealers are not supervisors within the meaning of the Act.⁶

We turn now to the Employer's contention that the franchise dealers have interests so diverse as to preclude their inclusion with employees in either of the existing units. The record shows that employees in both of the existing units are under the ultimate supervision of the circulation manager, and generally enjoy the same employment fringe benefits under the respective bargaining contracts. Reporting to the circulation manager are (1) the sales manager who is responsible for all sales, (2) the promotion manager who is responsible for the development and implementation of all promotional programs, and (3) the operations manager who is responsible for all mail and delivery operations. These three managers in turn have subordinate assistants and foremen reporting to them. The franchise dealers have daily contact, as described more fully below, with sales representatives, who work in the sales department and are included in the Petitioner's unit, and with route men who work in the operations department and are included in the Intervenor's unit. The telephone solicitors who assist the franchise dealer from time to time to obtain subscribers and carrier boys also work in the sales department, but they are part-time employees and unrepresented, except for the so-called head telephone solicitor who is full time and in the Petitioner's unit. There is no contact between other employees of the Employer and the franchise dealers.

The sales representatives are the communication link between the Employer and its retail outlets, including franchise dealers, with respect to maintaining and developing sales in assigned areas. They visit all outlets in such areas daily, but spend most of their time with outlets other than the franchise dealers. For example, one sales representative testified that he visits the five franchise dealers in his Queens area every morning between 6 and 7 o'clock, and 600 other outlets, such as newsstands and stores, during the rest of the

⁵ *The Sacramento Union, Inc.*, 160 NLRB 1515; *Eureka Newspapers, Inc.*, 154 NLRB 1181.

⁶ *Eureka Newspapers, Inc.*, *supra*, at p. 1185

day. According to the circulation manager, the sales representative is given detailed instructions concerning the franchise contract, and checks to see if the franchise dealer is properly performing such contract.⁷ Visits to the franchise dealer include discussion as to whether papers arrived and were delivered to subscribers timely, regulation of draws, promotional programs, etc., and an oral report of such discussion is given by the sales representative to his superior. Certain forms supplied to the franchise dealer by the Employer must also be approved by the sales representative or his superior before the franchise dealer is paid by the Employer. None of the franchise dealers has ever held any other position in the circulation department.

All bulk deliveries of the News are made from the Employer's plant by route men who are employees in the Intervenor's unit. They deliver to outlets in assigned areas, and make day-to-day adjustments in such deliveries based on the individual needs of the outlets as communicated to the Employer. Early editions are delivered each morning about 4 o'clock by morning route men to those outlets, including the franchise dealers, which are generally closed at that hour, and these route men return during the week to make collections from such outlets. The franchise dealer then distributes the papers through carrier-boy routes to the subscribers. Similar bulk deliveries are made by bulldog route men to outlets which are open for business at that hour, such as newsstands, but these deliveries are on a cash basis. The bulldog route men also deliver in bulk to Canada point men, who are employees of the Employer and in the Intervenor's unit. The

Canada point men are assigned by the Employer at strategic ambulatory locations to make bulk sales to independent hustlers who come to them, and the hustlers then retail the papers to the public.

The parties stipulated at the hearing that, with respect to three other major newspapers in the area, employees engaged in home delivery operations at two of them are represented by the Petitioner, and those at the third are represented by the Intervenor.

Upon the entire record, we find that neither Petitioner nor Intervenor can lay claim to the franchise dealers herein on the basis of any certification or bargaining contract or because of an accretion. The newly established home-delivery operation could properly be included in either of the existing units. On the one hand, they work closely with sales representatives in the unit represented by the Petitioner, but on the other hand their functions are also significantly related to those of the operating department morning route men and Canada point men in the unit represented by the Intervenor. In these circumstances, we conclude that the petition for clarification raises a question concerning representation which may not be resolved through a clarification of the existing units.⁸ Accordingly, we shall grant the Employer's request that the Petitioner's petition for clarification of its unit be dismissed.⁹

ORDER

It is hereby ordered that the petition for clarification of the unit be, and it hereby is, dismissed.

⁷ No such instructions are given the sales representative concerning outlets other than the franchise dealer.

⁸ See *International Paper Company, Long-Bell Division, Gardiner Branch*, 143 NLRB 1192, 1195

⁹ The Employer also requested that the Petitioner's certification be amended to exclude certain individuals as

supervisors, and adduced summary evidence at the hearing as to a number of such alleged supervisors covered by the Petitioner's contract. In view of our disposition of this case, however, and since the issue of supervisory status was not fully litigated, we find it unnecessary to pass upon this request by the Employer